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Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR RESPONDENT

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No. 519

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Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR RESPONDENT

In this case the Court is called upon to consider the constitutionality of a tax laid by the City of New York on the gross receipts of a contracting stevedore engaged in loading and unloading cargoes moving exclusively in interstate and foreign commerce.

In purported compliance with Chapter 873 of the Laws of 1934 of the State of New York, the Council of the City of New York adopted the following Local Laws:

Local Law No. 20 of 1938, effective June 30, 1938;
Local Law No. 103 of 1939, effective June 28, 1939;
Local Law No. 78 of 1940, effective June 29, 1940;
Local Law No. 47 of 1941, effective June 30, 1941.

Each of said Local Laws imposed a tax, measured by gross receipts, for the privilege of carrying on or exercising for gain or profit within the City of New York any trade, business or commercial activity.

Under protest and to avoid the imposition of penalties, respondent paid to the Collector of the City of New York, pursuant to said Local Laws, a tax, measured by respondent's gross receipts, for the years 1938-1941, inclusive, amounting altogether to $4,942.37 (R. 64-70).

Thereafter, respondent filed applications for refund (R. 73-81), which, after administrative hearings, were denied (R. 5). Upon respondent's petition the determination of the Comptroller was reviewed and nullified by the Appellate Division of the Supreme Court of the State of New York; First Judicial Department, on the authority of *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, and the Comptroller and Treasurer were ordered to refund the amount paid by the taxpayer, with interest (269 App. Div. 685). The Court of Appeals affirmed the order of the Appellate Division without opinion (294 N. Y. 908). In both courts the decisions were unanimous.

This Court granted certiorari on November 19, 1945.

Statement of the Case

Petitioners' brief does not state the facts as accurately or fully as we believe they should be stated.

Respondent is a New York corporation engaged in the business of general stevedoring in the Port of New York.

Respondent's only office is located in New York City (R. 49).

The general stevedoring business as carried on by respondent during the tax years in question within the territorial limits of the City of New York, consisted of the loading and unloading of steamships engaged, with one exception, exclusively in foreign commerce (R. 46, 47, 49, 51).

In the typical operation, loading a steamship, respondent received a list of cargo and had its plan clerk make up a plan for its stowage according to weight, type of cargo, destination, and other related matters (R. 21, 22, 61; Exhibit 12, R. 120-A, 120-B). This was usually done before the ship arrived (R. 22).

Upon the ship's arrival, respondent's men handled the lines in berthing her (R. 23), removed the hatches, rigged the cargo booms, discharged the ballast and did all else necessary to prepare the ship to receive cargo (R. 23).

Respondent's men then took possession of cargo, delivered to the pier by truckmen not in respondent's employ or received alongside the ship or pier in lighters not owned or operated by respondent (R. 23), and transferred it directly, and without any interruption, into the ship (R. 34, 35).

Loading and stowing completed, respondent's men unrigged the booms, secured the hatches, made everything shipshape, and finally cast off the lines to permit the ship to sail (R. 36).

In unloading a ship, the same routine, though, of course, in inverse order, was followed.

Some of the gear necessary to carry out the foregoing operations was furnished by the steamship company and some by respondent (R. 36, 37).

During the course of respondent's operations, respondent assumed responsibility for all damage to or loss of freight, injury to its own employees, and to third persons, and damage to the ship (Exhibits 8, 9 and 10; R. 85-98).

Labor was of two kinds.

First, there were men regularly carried on respondent's payroll, such as (1) a pier superintendent who was respondent's direct representative in charge of the whole operation and worked with the captain of the ship and the steamship company's pier superintendent, (2) a head foreman who directed the loading of the ship under the

supervision of respondent's pier superintendent, (3) an assistant foreman, (4) a hiring or shaping foreman who hired the men in gangs as required, (5) hatch or gang foremen who took charge of the gangs, (6) repairmen (R. 37-43).

Second, there were the longshoremen themselves, men who followed the various piers, assembled when work was to be done, and were hired by the hiring or shaping foreman (R. 37). They worked in gangs of twenty to thirty-five (R. 39) and their working conditions and rate of pay were regulated by agreement between the New York Shipping Association, of which respondent was a member (R. 45), and the International Longshoremen's Association (R. 45; Exhibit 11, R. 99-119).

Longshoremen working in the Port of Greater New York and vicinity were subject to two distinct wage scales: one for coastwise shipping (from the Port of New York to another port within the United States or vice versa) and one for deep sea shipping (from the Port of New York to a foreign port or vice versa). The deep sea rate was higher than the coastwise rate. All wages paid by respondent were paid at the deep sea rate (R. 46, 47).

All cargo loaded or unloaded by respondent in New York City was en route to or from a foreign port, that is, it was loaded into or discharged from ships engaged purely in foreign commerce, with the exception of one, the "Munargo," which touched at Miami, Florida (R. 46, 47, 49, 51).

Loading and unloading steamships and making incidental repairs to its own equipment constituted respondent's only activities (R. 50-51). It did not act as employment agency for steamship companies which attended to their own stevedoring (R. 58).

Respondent's services were rendered under contract to steamship companies such as Cunard White Star Ltd.,

Ellerman & Bucknall Steamship Company Limited, Munargo Line Company (Exhibits 8, 9 and 10, R. 85-98) and were paid for at specified rates per ton of cargo except that certain work was done on a "cost plus" basis. (See schedules R. 85, 91, 92, 95 and 96.)

In describing respondent's activities, we have been speaking of operations carried on within the territorial limits of the City of New York. Respondent also performed similar services at piers located in Hoboken, New Jersey and elsewhere outside of the City of New York during the tax years in question, the receipts from which were similarly taxed by petitioners.

As applied to its gross receipts from the operations described above, and it engaged in no others, respondent took the position (a) that in loading and unloading vessels engaged in commerce between the United States and foreign countries, it was itself engaged in foreign commerce and that the City of New York had no power to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts; (b) that the City of New York had no power to tax that part of respondent's gross receipts which were received as compensation for services rendered in New Jersey; (c) that the City of New York had no power to tax that part of respondent's gross receipts which were received for the performance of acts on vessels and/or structures not subject to the jurisdiction of the State of New York or the City of New York; (d) that the Local Laws did not authorize the imposition of the tax in question on respondent's gross receipts, or (e) if they did, they violated the Commerce Clause, the Fourteenth Amendment, the Constitution of the State of New York and the Enabling Act (New York Laws of 1934, Chap. 873); (f) that, if the Enabling Act purported to grant authority to the City of New York to levy the tax in question on respondent's

gross receipts, it, too, violated the Commerce Clause, the Fourteenth Amendment and the Constitution of the State of New York (R. 74-84).

POINT I.

The imposition of the tax on respondent's New Jersey receipts is not only unauthorized by the Enabling Act but is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Enabling Act provides that:

> "This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

Included in respondent's gross receipts upon which the tax was paid were substantial amounts received by respondent from stevedoring operations carried on within the territorial limits of the State of New Jersey. Such amounts were clearly exempt from tax under the provisions of the Enabling Act.

Even without the quoted exemption, the State of New York could not have delegated to the City of New York authority to lay a tax upon respondent with respect to work done in the State of New Jersey.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 139 (1937).

In their brief (p. 3) petitioners say that they "did not in the New York State courts and do not here press the

issue of the taxability of the receipts for New Jersey services", but neither do they expressly abandon the issue or refund the tax, and the fact is that, in their brief in the Appellate Division, they said, "we believe that the tax is applicable to the New Jersey receipts." So far as respondent is concerned, the issue is still a live one: Respondent still desires a refund of the tax on its New Jersey receipts and takes no comfort from petitioners' statement that they do not press the issue. The fortuitous circumstance that only about one tenth of respondent's services was rendered in New Jersey does not render the issue unimportant.

POINT II.

The imposition of the tax violates Article I, Section 8, Clause 3 of the Constitution of the United States.

Article I, Section 8, Clause 3 of the Constitution of the United States, provides that:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations and among the several States * * *"

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), Mr. Justice CARDOZO, writing for an unanimous Court, said, at page 92:

> "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.
>
> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work

> so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." ' "

What Mr. Justice CARDOZO said of the operations of the Puget Sound Stevedoring Company is equally true of respondent's operations in the case at bar and is not denied by petitioners. We therefore start with the undisputed premise that the challenged tax was laid upon gross receipts derived from the transportation of goods in interstate and foreign commerce.

That respondent's operations were conducted entirely within the State of New York* does not affect their interstate or foreign character.

> *Foster* v. *Davenport*, 22 How. 244 (1859);
> *The Daniel Ball*, 10 Wall. 557 (1871);
> *Moran* v. *New Orleans*, 112 U. S. 69 (1884);
> *Puget Sound Stevedoring Co.* v. *Tax Commission, supra* (1937).

State taxes levied directly upon gross receipts from the transportation of goods, persons or messages in interstate and foreign commerce or levied directly on the goods while in transit or exacted as a fee for the privilege of engaging in such traffic have long been held repugnant to the Commerce Clause.

> *Almy* v. *California*, 24 How. 169 (1861);
> *Crandall* v. *Nevada*, 6 Wall. 35 (1868);

* We shall ignore, for the sake of simplifying the argument, that part of respondent's activities which took place in New Jersey.

The Case of The State Freight Tax, 15 Wall. 232 (1873);
Fargo v. *Michigan*, 121 U. S. 230 (1887);
Philadelphia & S. Mail S. S. Co. v. *Pennsylvania*, 122 U. S. 326 (1887);
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Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384 (1935);
Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650 (1936);
Puget Sound Stevedoring Co. v. *Tax Commission*, 362 U. S. 90 (1937).

We doubt that any principle of constitutional law is better settled or supported by a greater number of precedents than the rule that States cannot levy direct taxes on interstate and foreign transportation.

> "The history of the commerce clause, from the pioneer efforts of Marshall to our own day, is the history of imposing artificial patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of states and nation." (Frankfurter, "The Commerce Clause Under Marshall, Taney & Waite", page 21, The University of North Carolina Press, 1937.)

In achieving this accommodation, so that interstate and foreign commerce can be required to pay its way and meet its fair share of the burden of local government, while still remaining unfettered by state regulation, this Court has sustained state taxes levied on personal property immediately before (*Coe* v. *Errol*, 116 U. S. 517 [1886]), and immediately after (*Woodruff* v. *Parham*, 8 Wall. 123 [1869]; *Sonneborn* v. *Cureton*, 262 U. S. 506 [1923]) its shipment in interstate commerce or during an interval while withdrawn from transportation (*Minnesota* v. *Blasius*, 290 U. S. 1 [1933]), but never while actually in transit (*Champlain* v. *Brattleboro*, 260 U. S. 366 [1922]; *Carson Petroleum* v. *Vial*, 279 U. S. 95 [1929]). It has sustained state taxes on the storage, withdrawal or use of personal property directly after it has completed its interstate journey (*Hemmeford* v. *Silas Mason*, 300 U. S. 577 [1937]), even though it was to be employed as an instrumentality of interstate commerce (*Southern Pacific* v. *Gallagher*, 306 U. S. 167 [1939]); *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 [1933]); on the delivery of possession of personal property at the conclusion of an interstate journey (*McGoldrick* v.

Berwind-White Coal Co., 309 U. S. 33 [1940]); and on the privilege of processing personal property temporarily withdrawn from transit (*Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17 [1934]); but it has never sustained a state tax levied at a fixed sum per ton or per barrel for the privilege of transporting such property in interstate commerce (*The Case of The State Freight Tax*, 15 Wall. 232 [1873]; *Eureka Oil Pipe Line* v. *Hallanan*, 257 U. S. 265 [1921]); nor has it ever sustained a license tax levied at a flat rate for the privilege of engaging in the transportation of property (*Crutcher* v. *Kentucky*, 141 U. S. 47 [1891]) or persons (*Crandall* v. *Nevada*, 6 Wall. 35 [1868]; *Sprout* v. *South Bend*, 277 U. S. 163 [1928]) or messages (*Leloup* v. *Mobile*, 127 U. S. 640 [1888]) or broadcasts (*Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 [1936]) in interstate commerce. It has sustained state taxes on net income from interstate commerce when derived from interstate sales (*United States Glue* v. *Oak Creek*, 247 U. S. 321 [1918]) or from interstate activities when apportioned to the taxing state (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 [1920]). It has sustained state franchise taxes and taxes in lieu of *ad valorem* taxes on real and personal property (*Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 [1891]; *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379 [1903]; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 [1895]; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [1891]; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450 [1918]) even when employed directly in interstate commerce and when measured by gross receipts derived from that commerce; and it has sustained state franchise taxes measured by gross receipts where, though the taxpayer was not engaged in interstate commerce, the gross receipts were derived solely from the rental of bridges (*Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 148 [1897]) or railroad trackage (*New York, L. E. &*

W. R. Co. v. *Pennsylvania*, 158 U. S. 431 [1895]) used by common carriers engaged in interstate commerce; but it has never sustained a state tax levied directly on gross receipts derived from interstate transportation or communication (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [1887], *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217 [1908]), even when properly apportioned to the intrastate phase of the business (*Meyer* v. *Wells Fargo*, 223 U. S. 298 [1912]; *Ratterman* v. *Western Union*, 127 U. S. 411 [1888]) or where, because the operations from which the receipts were derived took place wholly within the taxing state, there was no problem of apportionment (*Texas Transportation Co.* v. *New Orleans*, 264 U. S. 150 [1924]; *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 [1936]; *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 [1937]), (cf. *Ozark Pipe Line Co.* v. *Monier*, 266 U. S. 555 [1925]).

The reason why this Court has consistently denied to the States the right to levy direct taxes on the interstate transportation of goods, communications and persons is well known. In his argument in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), as summarized in the report, Daniel Webster said at page 11 that:

> "Few things were better known than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer than that the prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different states, and to place it under the protection of a uniform law. * * *"

And at page 12,

> "* * * The entire purpose for which the delegates assembled at Annapolis, was to devise means

for the uniform regulation of trade. They found no means but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. * * *"

While Chief Justice MARSHALL was not prepared to follow Mr. Webster's argument to the limit, this Court, in striking down state taxes on interstate transportation and related activities, has spoken again and again of the commercial chaos which it was the object of the Constitution and particularly of the Commerce Clause to remedy, and has been emphatic in denying to the states the right to encroach upon the power of Congress to regulate the national aspects of interstate commerce or to impede its free flow.

In *Brown* v. *Maryland*, 12 Wheat. 419 (1827), Chief Justice MARSHALL said, at page 446:

"* * * It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

In *Cooley* v. *Board of Wardens*, 12 How. 299 (1851), Mr. Justice CURTIS said, at page 319:

> "* * * Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [local pilotage], as imperatively demanding that diversity, which alone can meet the local necessities of navigation. * * *"
>
> * * * * * * * * *
>
> "* * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. * * *"

In *The Case of The State Freight Tax*, 15 Wall. 232 (1873), Mr. Justice STRONG said:

> "Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has, in effect, declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be

rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of $5. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another, without being obstructed by the intervention of state lines. * * * Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade * * *" (pp. 275, 276).

* * * * * * * * *

"It is of national importance that over that subject [transportation of passengers or merchandise through a State, or from one State to another] there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among other States was conferred upon the Federal Government" (pp. 279, 280).

In Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887), Mr. Justice BRADLEY said:

"* * * The tax was levied directly upon the receipts derived by the Company from its fares and

freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly, this could not be done by the State without interfering with the power of Congress" (p. 335).

* * * * * * * *

"It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the State at all, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs" (p. 346).

In *Leloup* v. *Port of Mobile*, 127 U. S. 640 (1888), Mr. Justice BRADLEY said, at page 648:

"* * * no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such

taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. * * *"

In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 (1891), in which the majority was careful to point out that it did not question the correctness of the decision in *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania, supra,* but in which the minority saw an impairment of the rule there enunciated, Mr. Justice BRADLEY, writing for himself and Justices HARLAN, LAMAR and BROWN, said at pages 233, 234:

"* * * The power to regulate commerce among the several states (except as to matters merely local) is just as exclusive a power in Congress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause and couched in the same phraseology; but if it may be exercised by the states, it might as well be expunged from the Constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the Constitution. The disputes between the different states in reference to interstate facilities of intercourse, and the discriminations adopted to favor each their own maritime cities, produced a state of things almost intolerable to be borne. * * *"

Often quoted is the reason given by Mr. Justice HOLMES in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227 (1908), for drawing the distinction between a direct tax upon gross receipts and a tax on property measured by gross receipts.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property of a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. [*Postal Teleg.*

> *Cable Co.* v. *Adams*] * * * The question is whether this is such a tax. * * * The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. * * * If it [the state tax] bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328 (1918), where this Court sustained a state tax on net income derived in part from interstate sales, Mr. Justice PITNEY stressed the distinction between a net income tax and a gross receipts tax as follows:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

In *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650, 655, Mr. Justice STONE said:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce."

In view of the foregoing authorities, it is not surprising that in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court decided unanimously that, in loading and unloading vessels plying in interstate and foreign commerce, the Puget Sound Stevedoring Company was itself engaged in interstate and foreign commerce but that in acting as employment agent for the purpose of making longshoremen available to steamship companies, it was engaged in a local enterprise separate and distinct from interstate commerce (*Williams* v. *Fears*, 179 U. S. 270 [1900], *Ware & Leland* v. *Mobile*, 209 U. S. 405 [1908]), and that, consequently, the gross receipts from the first form of activity were exempt from state taxation while those derived from the second were not.

It follows that, unless the *Puget Sound* case and the long line of cases which preceded it have been overruled, respondent's gross receipts were not taxable by the City of New York in the case at bar.

Petitioners contend that the decision of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), handed down less than four months after the decision in the *Puget Sound* case, in effect overruled the latter; that Mr. Justice CARDOZO's opinion, written for an unanimous Court only a few months earlier, should from that time forth have been regarded merely as the final expression of dead dogma; and that the New York Court of Appeals should not have followed the decision of this Court when presented with a case which, on its facts, could not be distinguished from the *Puget Sound* case.

Petitioners contend that the case at bar is controlled by

the holdings of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939) and *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33 (1940).

In *Western Live Stock* v. *Bureau of Revenue*, *supra*, this Court sustained a tax levied by the State of New Mexico for the privilege of engaging in the publication of newspapers and magazines, measured by gross receipts from the sale of advertising. The unsuccessful taxpayers claimed exemption from the tax because some of their advertising space was sold to non-residents of New Mexico and because their magazine enjoyed an interstate circulation.

Since the preparation and publication of the magazine was a purely local enterprise, quite separate and distinct from interstate commerce and the measure of the tax was fair, this Court sustained it.

In *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), a similar tax had been sustained over the objection that it was repugnant to the Commerce Clause. The *American Mfg.* case was directly in point and this Court found it controlling.

Western Live Stock v. *Bureau of Revenue* did not involve a state tax on gross receipts from interstate transportation and, in writing the opinion for the majority, the present Chief Justice was careful to point out that fact:

> "As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90; *ante*, 68, 58 S. Ct. 72 * * *" (p. 258).

"Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation" (p. 259).

"* * * On the other hand, * * * local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed [citing cases] or added to [citing cases] with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce [citing cases]. * * * The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove * * *" (p. 255).

Too much, in our opinion, has been read into the dicta thus pronounced. Petitioners draw from it a license to tax interstate commerce as freely as any other form of activity that takes place within their reach, provided that no other taxing authority can also reach the same activity. All the Court said, however, was that, if two states could tax the same activities simply because interstate commerce was being carried on, interstate commerce would be placed at a disadvantage as compared with intrastate commerce and any tax that exposed it to such a risk should be, and had always been, held repugnant to the Commerce Clause. It did not go on to say that, if a state avoided that one vice, it could tax, and hence regulate, interstate commerce as it pleased.

For the foregoing reasons, *Western Live Stock* v.

Bureau of Revenue, supra, is not in point, did not overrule *Puget Sound Stevedoring Co.* v. *Tax Commission, supra,* and is not, as petitioners contend, controlling in the case at bar.

In *Adam's Mfg. Co* v. *Storen,* 304 U. S. 307 (1938) the next case on which petitioners rely, this Court struck down an Indiana gross income tax as applied to income received by an Indiana manufacturer from interstate sales because there was the possibility that the same receipts might be taxed in the purchasers' states and thus place the interstate commerce at a disadvantage as compared with intrastate commerce.

Mr. Justice REED, writing for the majority said nothing which could be construed as overruling or discrediting the decision in the *Puget Sound* case. In fact, he cited it and *Fishers' Blend Station* v. *Tax Commission, supra,* in a footnote as illustrating the type of tax which had been repeatedly condemned as "a regulation of, and a burden upon, interstate commerce prohibited by" the Commerce Clause (p. 311). Mr. Justice BLACK, dissenting, stressed the fact that the tax in question was one which the state had levied on the taxpayer's sales, not, as in the case at bar, on the taxpayer's gross receipts from interstate transportation, which was quite a different matter.

For the foregoing reasons, *Adams Mfg. Co.* v. *Storen, supra,* is not in point and did not purport to overrule the *Puget Sound* case.

In *Gwin, White and Prince* v. *Henneford,* 305 U. S. 434 (1939), the next case on which petitioners rely, this Court struck down, for at least the third time, the same Washington gross receipts tax which it had invalidated in the *Fishers' Blend* and *Puget Sound* cases, this time as applied to the gross receipts of a fruit growers' marketing agent whose operations were carried on across state and national boundaries.

This was a transportation case, not in a primary sense, as in the case at bar, but in a secondary sense, as in *Texas Transportation Co.* v. *New Orleans*, 264 U. S. 150 (1924), and the Court struck down the tax for the same reason that it invalidated the tax in *Adams* v. *Storen, supra*. Mr. Justice BLACK, in a dissenting opinion restated, with emphasis upon the necessity for non-discrimination, the "reserved" or "concurrent powers" doctrine for which Chief Justice TANEY is remembered but, unless this Court is now prepared to adopt the views expressed in the dissenting opinions in this and the *Adams Mfg. Co.* case, we do not believe that *Gwin, White and Prince* v. *Henneford* adds anything to what was decided in *Western Live Stock* v. *Bureau of Revenue, supra*.

In *McGoldrick* v. *Berwind White Coal Co.*, 309 U. S. 33 (1940), the final case on which petitioners principally rely, this Court sustained the New York City sales tax as applied to interstate sales contracted and, (after interstate transportation), consummated in New York City. Whether the decision be justified on the theory of a "taxable moment", or because it was the equivalent of a use tax as in *Southern Pacific* v. *Gallagher*, 306 U. S. 167 (1939) (see the dissent of Mr. Justice DOUGLAS in *McLeod* v. *Dilworth*, 322 U. S. 327 [1944]), there is nothing in the decision which is decisive of the case at bar and nothing in the opinion written by the present Chief Justice which adds to what he had previously said in the *Western Live Stock*, and *Gwin, White & Prince* cases. He was careful to describe the tax as one which did not take place until after the termination of interstate transportation, and said at page 48: "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes * * * which are aimed at or discriminate against the

commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey." In this way, so it seems to us, he indicated as clearly as he could that, though the City of New York was at liberty to levy a sales tax after the transportation of goods in interstate commerce, it could not levy a tax, of the type now under consideration, on transportation itself.

Having shown that the cases upon which petitioners rely are not, as petitioners contend, decisive of the issue in the case at bar and that this Court has never sustained (except in the discredited case of *The State Tax on Railway Gross Receipts*, 82 U. S. 284 [1873]) a direct tax on gross receipts from interstate transportation, we turn to consider whether there is anything in the present case to lead this Court now to overrule the *Puget Sound* case and the long line of authorities upon which it rests and permit a direct tax on gross receipts from interstate transportation. We think there is not.

The gross receipts tax which petitioners levied in the case at bar lays a burden on interstate and foreign commerce in its simplest and most direct form.

The tax is laid directly on gross receipts from an activity which constitutes an indispensable link in the chain of commerce.

The tax is not levied in lieu of *ad valorem* property taxes. New York City levys the usual property taxes, in addition to retail sales and use taxes (Titles N & M of Chapter 41 of the New York City Administrative Code enacted pursuant to Chapter 873 of the laws of the State of New York, as amended) and a local occupancy tax on business property (Title C of Chapter 17 of the New York City Administrative Code enacted by Local Law 18, Laws

of 1938, pursuant to Chapter 823 of the Laws of the State of New York, as amended).

The tax is levied "for the privilege of carrying on for gain or profit within the city any trade or business", not for the purpose of police protection or to meet the cost of inspection of transportation or other facilities (*cf., Postal Teleg-Cable Co.* v. *Richmond*, 249 U. S. 252 [1919]), but "for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment" (a worthy purpose, no doubt, and reminiscent of the "Distressed and Decayed Pilots", their widows and children, in *Cooley* v. *Board of Wardens*, 12 How. 299 (1851), but hardly one which should be realized at the expense of national commerce).

The tax measured by respondent's gross receipts is not the only one which respondent must pay for the privilege of engaging in interstate and foreign commerce. Under Article 9-A of the New York State Tax Law, respondent is required to pay "for the privilege of exercising its franchises or doing business in this state in a corporate or organized capacity" a tax which, though said to be a franchise tax (*Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271 [1924]) is, in practical effect an income tax (*Educational Films* v. *Ward*, 282 U. S. 379 [1931]).

The tax cannot be sustained upon the theory that respondent expressly applied for the right to engage in or ever in fact engaged in intrastate or intracity business activities distinct from interstate commerce (*Ficke* v. *Shelby Taxing Dist.*, 145 U. S. 1 [1892]).

It is not even arguable that there is any interruption in the continuity of transit to justify the tax. The record shows that the object of employing contracting stevedores is to avoid delay in the transshipment of cargo. When

respondent takes control, the cargo is already in movement and never stops while respondent handles it (cf. *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95 [1929]; *Eureka Pipe Line* v. *Hallanan*, 257 U. S. 265 [1921]).

The tax cannot be justified upon the theory that, because respondent's activities take place wholly within one taxing jurisdiction, they cannot be reached elsewhere. The cost of stevedoring is only one of the elements of the affreightment contracts under which goods are transported from one end of this country to the other. The decision of this Court in *McGoldrick* v. *Berwind-White Coal Co., supra*, where the cost of the entire transportation was one of the elements of the contract price, demonstrates how a second tax may be laid on these same gross receipts, and the dissenting opinion shows how these same gross receipts can be utilized over and over in the measurement of other taxes along the line of transportation.

Respondent receives and transships freight for an agreed rate per ton. Its gross receipts are derived from that and nothing else. Why should New York City be permitted to take a toll from every ton of freight received from or destined to the interior of this country or foreign nations so long as it continues to bear, as it does, its fair share of the burdens of local government through the payment of the other taxes to which we have referred? If New York City can levy such a tax, it can do so in any amount that may be deemed necessary to achieve the particular purpose in mind, and so can every other state and municipality along the line of the interstate journey. In this way, just because interstate commerce is being done, freight can be exposed and subjected to such a cumulative burden of taxation that it will be brought to a halt. Everything that was urged in condemnation of the tax in *The Case of The State Freight Tax, supra*, can be said in condemnation of this.

The fact that the tax is non-discriminatory is no sufficient safeguard. The Port of New York dominates the Eastern Seaboard and through it passes the bulk of all the commerce between the United States and Europe. The New York City waterfront is lined with piers at which the vessels engaged in that commerce are loaded and unloaded. Compared to the volume of goods flowing through the port in interstate and foreign commerce, the volume of goods flowing through the port in intrastate commerce is insignificant. What safeguard is it to interstate and foreign commerce that the loading and unloading of goods travelling in intrastate commerce, between New York City and Albany, for example, is subject to the same tax?

Petitioners now argue that they should be permitted to levy a direct tax upon gross receipts derived from the transportation of goods in interstate and foreign commerce, so long as the tax is non-discriminatory and is levied upon receipts from activities which take place wholly within their territorial jurisdiction. To support their contention they cannot point to a single case in which this Court has sustained a direct tax on gross receipts from interstate transportation. With the exception of *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939), they cannot even cite a transportation case and must place their entire reliance on dicta contained in sales tax and other non-transportation cases. They make no distinction between taxes on sales or for the privilege of engaging in local business distinct from interstate transportation and taxes on interstate transportation itself.

If state sales taxes on interstate sales are to be permitted, we recognize the good sense in sustaining them when imposed by the buyer's state (*McGoldrick* v. *Berwin-White Coal Co.*, 309 U. S. 33 [1940]) and striking them down when imposed by the seller's state (*Adams Mfg. Co.*

v. *Storen*, 304 U. S. 307 (1938)), for it is only in the buyer's state, where domestic and foreign goods come to market together, that the impact of a sales tax on interstate and intrastate commerce can be equalized (see Lockhart, "The Sales Tax in Interstate Commerce," 52 Harv. L. Rev. 617 (1939)), but the problem in the sales tax cases is so different from the problem in the transportation cases that we cannot accept petitioners' view that the latter should be cut to the same pattern as the former.

With the sales tax cases there is the possibility of two taxes on the same receipts, one by the seller's state and one by the buyer's state.

In the transportation cases there is the possibility of a multitude of taxes, depending upon the number of taxing districts through which the goods pass in the course of their movement. If the City of New York can levy a tax on the cost of moving goods from pier to ship, the City of Hoboken can levy a like tax on the cost of moving the goods from freight car to lighter to be brought across the Hudson River, the City of Chicago can levy a like tax on the cost of placing the goods on the freight cars for shipment, and each state and municipality along the route can levy its own tax upon the movement of the goods within its territorial jurisdiction, until, by the imposition of a myriad of taxes, interstate commerce will be brought to a halt.

The fact that petitioners seek to reach only the activities which take place within the City of New York and that they do not discriminate in favor of local transportation is thus shown to be no justification for a direct tax on receipts from interstate transportation. In *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the State of New York sought only to control navigation within its own waters and only to enforce a monopoly which applied equally to domestic and foreign steamboat operators, but the regulation

crippled interstate commerce and was struck down by this Court.

The fact that the tax is small in amount is also no justification for it, for the power to levy a small tax presupposes the power to levy a large tax and, for this Court to sustain the power of the City of New York to levy such a tax would be to invite each state, city and taxing district to levy its own tax, each in an amount, large or small, thought by it to be appropriate.

What petitioners seek, in effect, is the power to directly tax and hence to regulate or even to prohibit interstate commerce within the territorial jurisdiction of the City of New York. The exercise of such power locally caused the stagnation of interstate commerce under the Confederation and it was to take such a dangerous power away from the states and place such commerce under national control that the Commerce Clause was enacted. The necessity for the continued protection of interstate transportation from the exercise of so dangerous a power is incomparably greater today than ever before, for our dependence upon the free flow of goods in commerce has immeasurably increased. It would be a calamity, if interstate transportation were again to be subjected to direct local taxation."

POINT III.

The imposition of the tax is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Under the provisions of Article I, Section 4, Paragraph 11 of the New York Tax Law, the City of New York would clearly be without power to levy a tax on gross receipts of steamship companies doing their own stevedoring. The statute referred to states that:

> "All corporations incorporated under the laws of the state of New York, engaged in ocean commerce between any port in the United States and any foreign port, all of whose vessels are employed between foreign ports and ports in the United States, are exempted from all taxation in this state, for state and local purposes, upon their capital stock, franchises and earnings, for the period beginning January first, nineteen hundred thirty-three and ending December thirty-first, nineteen hundred and fifty-two."

To levy an excise tax on respondent's gross receipts for the privilege of engaging in business indispensable to waterborne commerce, and any serious interruption of which cripples at once the activities of a port, without levying a similar tax on steamship companies for the privilege of engaging in the same activities denies to respondent the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

As stated by this Court in the *Puget Sound* case, "What is decisive is the nature of the act, not the person of the actor." The act being the same, the authority to levy the tax must likewise be the same. In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389 (1928) it was held that the imposition of a tax on the gross receipts of corporations operating taxicabs, when such tax was not imposed upon individuals and partnerships engaged in the same business, unconstitutionally deprived the corporations of the equal protection of the laws where other taxes were laid upon both classes of taxpayers alike.

POINT IV.

The imposition of the tax violates Article I, Section 10, Clause 2 of the Constitution of the United States.

Article I, Section 10, Clause 2 of the Constitution of the United States provides that:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

All of the vessels loaded and unloaded by respondent were engaged in foreign commerce.

The imposition of a tax on respondent's gross receipts necessarily increases the cost of the services performed by respondent and correspondingly increases the cost of importing and exporting goods and constitutes a levy of duties on imports and exports contrary to said provisions of the Constitution. As stated in *The Main*, 51 Fed. 954, 957 (C. C. A. 5th) (1892):

> "* * * A vessel, in taking on and unloading cargo, is earning freight; for, in loading and unloading, services are rendered, the expense of which necessarily enters into the affreightment contract. * * *"

That a tax which has such effect is contrary to the provisions of the Constitution referred to appears from the opinion of this Court in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295 (1917) wherein it was stated:

"The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

"We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and for the same reason, to be in effect an impost or duty upon exports. * * *"

Notwithstanding that the impact of a state tax on interstate commerce is much the same as it would be on foreign commerce and that, as Mr. Justice PITNEY pointed out in the *Crew Levick* case, *supra*, the imposition of a tax on gross receipts regulates and burdens the one no less than the other and notwithstanding also that in *Brown* v. *Maryland*, 12 Wheat. 419 (1827) Chief Justice MARSHALL could perceive no difference between state regulation of imports from foreign countries as compared with imports from sister states, this Court has distinguished the two in its rulings on the subject now under consideration and has sustained state taxes as applied to interstate commerce

which it has condemned as applied to foreign commerce. (Compare *Brown* v. *Maryland, supra,* with *Woodruff* v. *Parham,* 8 Wall. 123 (1869) and *Sonneborn* v. *Cureton,* 262 U. S. 506 (1923). The reasons adduced for the distinction are that foreign commerce is a matter which must necessarily be regulated by international treaties; that, accordingly, Congress alone has the power to regulate it; and that, in addition, Congress has affirmatively regulated it and the states cannot interfere with that regulation or place any extra burdens upon such commerce (*McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414 [1940]).

We therefore cannot over-emphasize the fact that all of the vessels loaded or unloaded by respondent were engaged in foreign commerce; that respondent was paid for its services at an agreed rate per ton of freight; and that, consequently, the tax which petitioners levied on respondents gross receipts was "by its necessary effect * * * an impost or duty upon exports * * *" and imports in violation of Article I, Section 10, Clause 2 of the Constitution of the United States.

POINT V.

The imposition of the tax constitutes an unlawful interference with the paramount power of Congress over navigation upon the navigable waters of the nation.

A vessel in loading or unloading freight is still engaged in the business of navigation. See *Leathers* v. *Blessing,* 105 U. S. 626 (1882), wherein it was stated:

> "* * * The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo

was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf and that she had communication with the shore by a gangplank, did not make her a part of the land or deprive her of the character of a water-borne vessel."

This principle was recognized in *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31 (1942), wherein this Court held that a vessel moored to a dock upon navigable waters of the United States is subject to the admiralty and maritime jurisdiction of the United States and that acts committed by seamen thereon may constitute mutiny.

That such vessel is regarded by Congress as still engaged in the business of navigation appears from various laws enacted by Congress. Thus, Congress has legislated concerning the time during which such a vessel may be loaded and unloaded (U. S. C. A. Title 46, Section 85, et seq.).

The fact that the stevedoring operations performed by respondent were performed upon vessels moored to docks within the territorial limits of the City of New York is immaterial. The operations performed were a part of the business of navigation and the City of New York could, therefore, levy no tax for the privilege of engaging therein.

CONCLUSION.

Respondent respectfully submits that the final order and judgment of the lower court directing the refund of the tax in question should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

Nos. 29 AND 30.—OCTOBER TERM, 1946.

Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners, 29 v. Carter & Weekes Stevedoring Company. Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners, 30 v. John T. Clark & Son.	On Writs of Certiorari to the Supreme Court of the State of New York.

[March 10, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

These two writs of certiorari bring before this Court contentions in regard to the application to the respective respondents, Carter & Weekes Stevedoring Company and John T. Clark & Son, of New York City, of the general business tax laws covering, when both cases are considered, the years 1937 to 1941, inclusive.[1] The character of the taxes in issue will appear from a section, set out below,

[1] The taxes in question were levied by the City of New York by a series of local laws, No. 22 of 1937, No. 20 of 1938, No. 103 of 1939, No. 78 of 1940, No. 47 of 1941. The local laws were passed pursuant to authorization by the State of New York. See Laws of New York 1940, Ch. 245. There is no dispute as to the general validity of the local laws. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573. These cases involved other phases of these local laws.

Certiorari granted, 326 U. S. 713; argued March 1, 1946; restored to the docket for reargument April 22, 1946.

of a local law imposing the tax for 1939 and 1940.[2] The respective taxpayers are liable also for the general income and *ad valorem* taxes of the State and City of New York. Both respondents are corporations engaged in the business of general stevedoring. For these cases, the business of respondents may be considered as consisting only of taking freight from a convenient place on the pier or lighter wholly within the territorial limits of New York City and storing it properly for safety and for handling in or on the outgoing vessel alongside, or of similarly unloading a vessel on its arrival. The vessels moved in interstate or foreign commerce, without a call at any other port of New York. We do not find it necessary to consider separately interstate and foreign commerce. The Commerce Clause covers both.

Through statutory proceedings unnecessary to particularize, the Comptroller of the City of New York determined that the respondents were liable for percentage taxes upon the entire gross receipts from the above activities for the years in question under the provisions of the respective local laws to which reference has been made. Review of

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[2] Local Laws of the City of New York (1940), No. 78:

"§ R41-2.0. Imposition of tax. a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, . . ."

No problem of allocation or apportionment is involved. See § 5. No question is raised by petitioner that any part of the tax is allocable to receipts properly attributable to doing business in New York City, if all of the receipts are not subject to the local act. § R41-3.0.

these determinations was had by respondents in the Supreme Court of New York County, Appellate Division. The determinations of the Comptroller were annulled on the authority of *Puget Sound Stevedoring Company* v. *Tax Commission*, 302 U. S. 90. 269 App. Div. 685. These orders were affirmed by the Court of Appeals, 294 N. Y. 906, 908, and remittiturs issued stating that the Court of Appeals affirmed on the ground that the local laws as applied in these cases were in violation of Article I, § 8, Clause 3, of the Constitution of the United States.[3] Writs of certiorari to this Court were sought and granted on the issue of whether or not this tax on these respondents constituted an unconstitutional burden on commerce.

Petitioners recognize the force of the *Puget Sound* case as a precedent. Their argument is that subsequent holdings of this Court have indicated that the reasons which underlay the decision are no longer controlling in judicial examination of the constitutionality of state taxation of the gross proceeds derived from commerce subject to federal regulation. They cite, among others, these later decisions: *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U. S. 62.

In the *Puget Sound* case a state tax on gross receipts, indistinguishable from that laid by New York City in this case, was held invalid as applied to stevedoring activities exactly like those with which we are here concerned. The *Puget Sound* opinion pointed out, p. 92 *et seq.*, that transportation by water is impossible without loading and unloading. Those incidents to transportation occupy the same relation to that commerce whether performed by the

[3] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

crew or by stevedore, contracting independently to handle the cargo. The movement of cargo off and on the ship is substantially a continuation of the transportation. Cf. *Baltimore & O. S. W. R. Co.* v. *Burtch*, 263 U. S. 540.

It is trite to repeat that the want of power in the confederation to regulate commerce was a principal reason for the adoption of the Constitution. The Commerce Clause bears no limitation of power upon its face and, when the Congress acts under it, interpretation has suggested none, except such as may be prescribed by the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; *North American Co.* v. *S. E. C.*, 327 U. S. 686, 704. On the other hand, the Constitution, by words, places no limitation upon a state's power to tax the things or activities or persons within its boundaries. What limitations there are spring from applications to state tax situations of general clauses of the Constitution. *E. g.*, Art. I, § 10, Cl. 2 and 3; *New York Indians*, 5 Wall. 761; *Board of County Commissioners* v. *United States*, 308 U. S. 343; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 284; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614–15; *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 581–82. From the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce[4] and that this rule applies in full force to

[4] *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767–69, and cases cited; *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373, 379 and cases cited n. 17; *Freeman* v. *Hewit*, No. 3, October Term, 1946, decided December 16, 1946; *Richfield Oil Corp.* v. *State Board of Equalization*, No. 46, October Term, 1946, decided November 25, 1946, slip op. p. 5.

an unapportioned[5] tax on the gross proceeds from interstate business,[6] where the taxes were not in lieu of *ad valorem* taxes on property.[7]

We do not think that a tax on gross income from stevedoring, obviously a "continuation of the transportation," is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself.

When we come to weigh the burden or interference of this tax on the gross receipts from interstate commerce, the purposes of that portion of the Commerce Clause—the freeing of business from unneighborly regulations that inhibit the intercourse which supplies reciprocal wants by commerce[8]—is a significant factor for consideration. An interpretation of the text to leave the states free to tax commerce until Congress intervened would have permitted intolerable discriminations. *Nippert* v. *City of Richmond*, 327 U. S. 416, and cases collected in notes

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[5] Compare *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 301; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123; *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157.

[6] *Fargo* v. *Michigan*, 121 U. S. 230; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 428; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Galveston, Harrisburg & San Antonio R. Co.* v. *Texas*, 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300; *Minnesota Rate Cases*, 230 U. S. 352, 400; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295; *Fisher's Blend Station* v. *Tax Comm'n*, 297 U. S. 650, 655; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312; *Freeman* v. *Hewit*, *supra*.

[7] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 346–48.

[8] Federalist 7, 22, 42; *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 523.

13, 14, 15 and 16. Nevertheless, a proper regard for the authority of the states and their right to require interstate commerce to contribute by taxes to the support of the state governments which make their interstate commerce possible, has led Congress, over a long period to leave intact the judicial rulings, referred to above, that apportioned, non-discriminatory gross receipt taxes or those fairly levied in lieu of property taxes conformed to the requirements of the Commerce Clause. As the power lies in Congress under the Clause to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues.[9] There is another reason that may be the basis for the acceptance, almost complete, by Congress of the judicial interpretations in this field. This is that a wide latitude exists for permissible state taxation. This term, in an effort to show that the reach of the Circuit Court did not destroy the state's power to make commerce pay its way, we elaborated the fact that taxes on the commerce itself was not the sole source of state revenue from that commerce. *Freeman* v. *Hewit*, *supra*, p. 5; see also *Adams Mfg. Co.* v. *Storen*, *supra*, 310.

A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 255. The selection of an intrastate incident as the taxable event actually

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[9] See *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 326; *United States* v. *Hill*, 248 U. S. 420; *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 430; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769; *Freeman* v. *Hewit*, No. 3, October Term 1946, decided December 16, 1946, slip op. p. 4.

carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy.[10] This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading. The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—*ad valorem*, net income or excise. Cf. *Western Live Stock* v. *Bureau*, *supra*, 254. We need consider only whether or not the loading and unloading is distinct enough from the commerce to permit the tax on the gross.

On precedent, the *Puget Sound* case is controlling. It was promptly and recently cited with approval.[11] It appears in *Adams Mfg. Co.* v. *Storen*[12] in support of the possible double tax argument against levies on interstate commerce. In *Western Live Stock* v. *Bureau*, *supra*, 258, it was adverted to as a case for comparison with a ruling that "preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce." The case was not included in the Court's opinion in *Gwin, White & Prince, Inc.* v. *Henneford*,[13] where a state gross

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[10] *Western Live Stock* v. *Bureau*, *supra*, 258–260; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 176; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 48; *Dept. of Treasury* v. *Wood Co.*, 313 U. S. 62.

[11] *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, 609; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 178; *Freeman* v. *Hewit*, *supra*, p. 8.

[12] 304 U. S. 307, 312.

[13] 305 U. S. 434.

receipts tax on income from marketing fruit interstate was invalidated under the Commerce Clause, or in *McGoldrick* v. *Berwind-White Co.*,[14] though relied upon in the concurring opinion in the first at p. 442 and the dissent in the second at p. 62. Upon examination this history gives an impression that there has been a doubt as to the continued vitality of *Puget Sound*. We come now face to face with the problem of overruling or approving the case.

Since *Puget Sound* there has been full consideration of how far a state may go in taxing intrastate incidents closely related in time and movement to the interstate commerce. The cases that lend strongest support to petitioners' argument for overruling the *Puget Sound* decision have been referred to above. We comment further upon them. The 2% excise tax levied by New Mexico on the gross receipts of publishers from advertising, upheld in *Western Live Stock*, was found to be an exaction for carrying on a local business.[15] The *Gallagher* case turns expressly on our conclusion that a use tax is validly levied on an intrastate event, "separate and apart from interstate commerce," p. 176, and the *Wood Preserving* case [16] reached a similar result by reason of the fact that

[14] 309 U. S. 33.

[15] 303 U. S. at 257.

"All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere." P. 260. "So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. . . . Practical rather than logical distinctions must be sought." P. 259.

The alternate ground, p. 260, that such a local tax cannot be taxed elsewhere is inapposite in such a foreign commerce situation as this.

[16] See *Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, 348.

the taxpayer sold and delivered its ties intrastate before transportation began, 313 U. S. at 67. This is likewise true of *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, as explained in the *Storen case*.[17] When we examine the *Berwind-White* tax on the purchasers of tangible personal property for consumption, there is the same reliance upon the local character of the sale, pp. 43, 47, 49, 58.[18] We there said, p. 48:

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[17] 304 U. S. at 312–13:

"The state court and the appellees rely strongly upon *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, as supporting the tax on appellant's total gross receipts derived from commerce with citizens of the State and those of other States or foreign countries. But that case dealt with a municipal license fee for pursuing the occupation of a manufacturer in St. Louis. The exaction was not an excise laid upon the taxpayer's sales or upon the income derived from sales. The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales. The taxpayer had during the preceding year removed some of the goods manufactured to a warehouse in another State and, upon sale, delivered them from the warehouse. It contended that the city was without power to include these sales in the measure of the tax for the coming year. The court held, however, that the tax was upon the privilege of manufacturing within the State and it was permissible to measure the tax by the sales price of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another State."

Cf. *Freeman* v. *Hewit*, No. 3, October Term, 1946, slip op. p. 3.

[18] 309 U. S. at 49: "Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the use of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co.*, *supra*; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline,

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey."

Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company*. "What makes the tax invalid is the fact that there is interference

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similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500."

by a State with the freedom of interstate commerce." *Freeman* v. *Hewit*, *supra*, p. 7. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause.

Affirmed.

MR. JUSTICE BLACK dissents.

SUPREME COURT OF THE UNITED STATES

Nos. 29 and 30.—October Term, 1946.

Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners,

29 v.

Carter & Weekes Stevedoring Company.

Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners,

30 v.

John T. Clark & Son.

On Writs of Certiorari to the Supreme Court of the State of New York.

[March 10, 1947.]

Mr. Justice Douglas, with whom Mr. Justice Rutledge concurs, dissenting in part.

First. I think the tax is valid insofar as it reaches the gross receipts from loading and unloading vessels engaged in interstate commerce.

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90, makes clear that respondents' activities in loading and unloading the vessels are interstate commerce. That case followed a long line of decisions[1] when it held in 1937 that a State could not tax the privilege of engaging in interstate or foreign commerce by exacting a percentage of the gross receipts.

[1] *Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298.

Those cases, like the present one, involved no exaction by the State of a license to engage in interstate commerce on the payment of flat license tax or otherwise. Cf. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Cooney* v. *Mountain States Tel. Co.*, 294 U. S. 384; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 114. Nor did they, any more than the present case, concern legislation which expressed hostility to interstate commerce by discriminating against it. Cf. *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Nippert* v. *City of Richmond*, 327 U. S. 416. Although all or like business of a local nature was subject to the same tax, the interstate business was granted immunity. The theory, as expressed in *Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336, was that taxation was one form of regulation and a tax on the gross receipts from interstate transportation would be "a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress."

The tax in that case was a tax on the gross receipts from fares and freight for the transportation of persons and goods in interstate and foreign commerce. It was unapportioned. As we shall see, the holding in the *Philadelphia & Southern S. Co.* case has not been impaired. But the principle it announced—that a tax on the gross receipts was forbidden because it was a regulation of interstate or foreign commerce—was not given full scope. For soon gross receipts taxes on businesses engaged in interstate commerce (including transportation or communication) were sustained where they were not discriminatory and where they were fairly apportioned to the commerce carried on in the taxing state.[2] *Maine* v. *Grand Trunk Ry.*

[2] In *Railroad Co.* v. *Maryland*, 21 Wall. 456, the payment of a percentage of gross receipts was upheld as a condition of the corporate franchise.

Co., 142 U. S. 217. Their validity was established whether they were employed as a measure of the value of a local franchise (*Maine* v. *Grand Trunk Ry. Co.*, *supra*; *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U. S. 379) or were used in lieu of all other property taxes to measure the value of the property in the State. *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157.

The distinction between an apportioned gross receipts tax and a tax on all the gross receipts of an interstate business, such as was involved in *Philadelphia & Southern S. Co.* v. *Pensylvania*, *supra*, pp. 335–336, was explained in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 256, which was decided in 1938. The Court stated that the latter type of tax could be imposed or added to "with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. . . . The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." This explanation of the vice of the unapportioned gross receipts tax had been earlier suggested in *Case of the State Freight Tax*, 15 Wall. 232, 280, and has been accepted by our decisions since the *Western Live Stock* case. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438–440; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 45–46. In both *Adams Mfg. Co.* v. *Storen*, *supra*, and *Gwin, White & Prince Inc.* v. *Henneford*, *supra*, unapportioned gross receipts taxes as applied to the receipts from interstate sales were held invalid. It was said that the vice of such a tax was that interstate commerce

would be subjected "to the risk of a double tax burden to which intrastate commerce is not exposed. . . ." *Adams Mfg. Co.* v. *Storen*, *supra*, p. 311. Or as stated in *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*, p. 439:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

As was later stated in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 175, as respects taxes on gross receipts from interstate transactions or interstate transportation, "The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies is upheld."

Under that view the *Philadelphia & Southern S. Co.* case would be decided one way and the *Puget Sound Stevedoring Co.* case the other. As we have noted, the tax in the *Philadelphia & Southern S. Co.* case was a gross receipts tax on fares and freight for the transportation of persons and goods in interstate and foreign commerce. It was unapportioned. And there was the risk of multiple taxation to which local transportation, though also taxed, was not subjected. The same was true of *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; and *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298.

But in the *Puget Sound* case any risk of multiple taxation was absent. The same is true of the present case.

For in each the activity of loading and unloading was confined exclusively to the State that imposed the tax. No other State could tax the same activity.[3] The tax therefore is in its application nothing more than a gross receipts tax apportioned to reach only income derived from activities within the taxing State. The gross receipts reflect values attributable to the business or property wholly within the taxing state. Under the test of our recent decisions (*Western Live Stock* v. *Bureau of Revenue, supra; Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*), the tax would therefore seem to be unobjectionable.

It is true, however, that taxes on gross receipts of transportation companies and other interstate enterprises were held invalid in cases prior to the *Puget Sound* case, even though all of the activities were confined to the taxing state and could not be taxed by any other state. *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338. Cf. *Fargo* v. *Michigan*, 121 U. S. 230. The explanation given in the *Galveston* case was that a tax on the gross receipts was a regulation of commerce, as the *Philadelphia & Southern S. Co.* case held. It distinguished *Maine* v. *Grand Trunk Ry. Co., supra*, and the other apportionment cases on the ground that they involved taxes on property, the gross receipts being taken as the measure of the value of the property. The Court said (210 U. S., p. 227):

[3] The Court suggests that the fact that similar stevedoring activity will be required at the destination creates a risk of multiple taxation, since the State of destination would be as free to tax the unloading as New York to tax the loading. This is only multiple in the sense that each State taxes what occurs within its borders; the two taxes would not be on the same activity. It is no more relevant that stevedoring is involved in both cases, than is the fact that two States may impose property taxes on terminals or trackage within their respective borders.

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

The *Galveston* case, like the *Philadelphia & Southern S. Co.* case, involved a tax applicable to transportation companies alone.[4] Whatever may be said for the proposition that a gross receipts tax, applicable only to transportation companies, may readily become the instrument

[4] Moreover, the tax in the *Philadelphia & Southern S. Co.* case was restricted not only to transportation companies but also to receipts from transportation. Those facts were emphasized by Mr. Justice Bradley (122 U. S. pp. 344–345): "Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which

for impeding or destroying interstate commerce, that consideration has no relevancy here. For in the present case, as in the *Puget Sound* case, all businesses are taxed alike. There is equality throughout; and interstate commerce is taxed no heavier than local business. Political restraints, perhaps lacking when a particular type of business is singled out for special taxation, would not be absent here.

Moreover, the difference between a tax on property measured by gross receipts and a tax on the gross receipts does not appear significant in constitutional terms when the issue is one of undue burden on interstate commerce. Either might be an instrument to that end. The apportioned gross receipts tax in *Maine* v. *Grand Trunk Ry. Co.*, *supra*, was in terms "an annual excise tax for the privilege of exercising" the corporation's franchises in the State. 142 U. S. p. 219. The Court stated, p. 228, "a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. . . ." As much can be said of the present case and of the *Puget Sound* case. While the tax is in terms one on the privilege of doing

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it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. As a tax on transportation, we have already seen from the quotations from the *State Freight Tax Case* that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only." Cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, which sustained as against an interstate enterprise a net income tax of general application.

business, resort is made to the gross receipts merely to ascertain the value of the business. No vice of extra-territoriality or multiple taxation is involved. The value taxed is attributable to business within the taxing State and may not be reached by any other State. That value is, of course, augmented by the interstate character of the business. But the same is true in any apportionment case. *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, *supra*, p. 225; *Cudahy Packing Co.* v. *Minnesota*, *supra*, pp. 455–456.

Respondents pay other taxes to New York City, including the usual property taxes. But so long as a tax does not discriminate against interstate commerce and is fairly apportioned to the activities in the taxing state, taxing the business twice is for constitutional purposes no different than doubling a single tax. If the whole scheme of taxation adopted by a particular State were taken into account, it might be that a case of discrimination against interstate commerce could be made out. But there is no suggestion that this is such a case. Nor can we say that the system which has been adopted here bids fair to be more harmful to interstate commerce than a system designed to raise the same amount of revenue by the use of a gross receipts tax in lieu of property taxes.

Moreover, as noted in *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*, p. 438, and in *Adams Mfg. Co.* v. *Storen*, *supra*, pp. 312–313, there have been other cases sustaining a gross receipts tax on interstate enterprises where the gross receipts tax fairly measured the value of a local privilege or franchise and all risk of multiple taxation was absent. *Ficklen* v. *Shelby Co. Taxing District*, 145 U. S. 1, upheld a state license tax imposed upon the privilege of doing a brokerage business within the State and measured by the gross receipts from sales of merchandise shipped into the State for delivery after sales were made. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, upheld

a municipal license tax on the gross receipts of a manufacturer who was producing goods for interstate commerce. The tax was sustained as an excise upon the conduct of a manufacturing enterprise. Those taxes, like property taxes or taxes on activities confined solely to the taxing state (*New York, Lake Erie & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604) have no cumulative effect caused by the interstate character of the business. They are apportioned to the activities taxed, all of which are intrastate. Plainly the loading and unloading involved in the present case are activities as local in character as the brokerage activities in the *Fisklen* case or the manufacturing business in the *American Mfg. Co.* case. One has as close and as immediate a relationship to interstate commerce as the other. Cf. *United States* v. *Darby*, 312 U. S. 100. If one gives rise to a taxable event for which the State may exact a portion of the gross receipts, it is difficult to see why the other does not. The practical effect on interstate commerce is the same in each.

In *McGoldrick* v. *Berwind-White Co.*, *supra*, p. 52, we held that a sales tax on the purchase of property at the end of its interstate journey was not to be distinguished from a tax on the property itself. For taxation of the sale was merely taxation of the exercise of one of the constituent elements of the property. Unless formal doctrine is to be restored to this field, the label which the tax bears should not be controlling; and the tax should be sustained unless it evinces hostility to interstate commerce or in practical operation obstructs or impedes it. Either result may obtain whether the tax be called a property tax or a gross receipts tax. As *McGoldrick* v. *Berwind-White Co.*, *supra*, p. 48, states:

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or de-

stroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Measured by that test the present tax is not invalid. "Even interstate business must pay its way. . . ." *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259. A non-discriminatory gross receipts tax, apportioned to local activity in the taxing state, is to be judged by its practical effect. As we stated in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444:

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."

All local taxes on interstate businesses affect to some degree the commerce and increase the cost of doing it. Matters of form should not be decisive if the tax threatens no harm to interstate commerce.

Prior to *McGoldrick* v. *Berwind-White Co.*, *supra*, it had long been said that "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins* v. *Shelby Co. Taxing District*, 120 U. S. 489, 497. That was the philosophy of the *Philadelphia & Southern S. Co.* case. And see *Fargo* v. *Michigan*, *supra*, pp. 246–247. But *McGoldrick* v. *Berwind-White Co.*, *supra*, did not adhere to that formal doctrine. It followed *Wisconsin Corp.* v. *Pennsylvania*, 294 U. S. 169, and upheld a "non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce . . . but because the tax was not a prohibited regulation of, or burden on, that commerce." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 505. The test adopted was whether the tax on the local activity as a practical matter was being used to place interstate commerce at a competitive disadvantage or obstruct or impede it. That should be the approach here; "the logic of words should yield to the logic of realities." Mr. Justice Brandeis dissenting, *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 43. The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that *Freeman* v. *Hewit*, 329 U. S. —, marked the end of one cycle under the Commerce Clause and the beginning of another.

Second, I think the tax is unconstitutional insofar as it reaches the gross receipts from loading and unloading vessels engaged in foreign commerce. Such a tax is repugnant to Article I, § 10, Clause 2 of the Constitution which provides that "No State shall, without the Consent of the

Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws. . . ."

Loading and unloading are a part of "the exporting process" which the Import-Export Clause protects from state taxation. See *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, 27. Activity which is a "step in exportation" has that immunity. *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 68. As the Court says, loading and unloading cargo are "a continuation of the transportation." Indeed, the commencement of exportation would occur no later. See *Richfield Oil Corp.* v. *State Board*, 329 U. S. —. And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident "which gave rise to the accrual of the tax was a step in the export process." *Richfield Oil Corp.* v. *State Board, supra*, p. —.

As we pointed out in that case, the Commerce Clause and the Import-Export Clause "though complementary, serve different ends." 329 U. S. p. —. Since the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. Taxes designed to make interstate commerce bear a fair share of the cost of local government from which it receives benefits have been upheld; taxes which discriminate against interstate commerce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated. But the Import-Export Clause is written in terms which admit of no exception but the single one it contains. Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example.

MR. JUSTICE MURPHY joins in this dissent except as to the second part, as to which he is of the opinion that the tax in relation to the gross receipts from loading and unloading vessels engaged in foreign commerce is constitutional.